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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above case on January 10, 1968 and February 5, 1968.

OPINIONS BELOW.

The District Court for the Northern District of Illinois, Eastern Division, did not render an opinion on this case. The opinion of the Court of Appeals for the Seventh Circuit (App., pp. 1a-9a) has not been reported at the time of the printing of this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on January 10, 1968, and a copy thereof is appended to this Petition in the Appendix at p. 10a. A Petition for Rehearing was denied by the aforesaid Court of Appeals on February 5, 1968, and a copy of the order by which the Petition for Rehearing was denied is appended to this Petition in the Appendix at p. 11a. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

The Questions Presented are:

1. Whether the total absence of any questioning of the Petitioner by the Trial Judge as to Petitioner's understanding of the nature of the charges against him can be considered to be a compliance with Rule 11 of the Federal Rules of Criminal Procedure.

2. Whether the District Court abused its discretion by entering a judgment of conviction after it knew or should have known that Petitioner did not understand the nature of the charge.

3. Whether the District Court denied Petitioner his rights under the Fifth and the Sixth Amendments to the Constitution by entering a judgment of conviction without any basis for a determination that the Petitioner understood the nature of the charge.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED.

The Fifth Amendment and the Sixth Amendment to the Constitution of the United States, 26 U.S.C. 7201, and Rule 11 of the Federal Rules of Criminal Procedure are set forth in the Appendix at pp. 23a-24a.

STATEMENT OF THE CASE.

This case arises under 26 U.S.C. 7201. The basic facts, which are not in dispute, are as follows:

William J. McCarthy, the Petitioner, is a resident of Chicago, Illinois. He is 66 years old and has 5 children. He has a High School education. He has never before been indicted or convicted of any Federal offense.

Petitioner had a lengthy history of alcoholism, for which he had been hospitalized. His drinking had affected his business, that of a Jobber in the Printing Trade. Following the time of the Indictment, and at approximately the time of the tender of a plea of guilty, Petitioner became a member of Alcoholics Anonymous.

On April 1, 1966 Petitioner McCarthy was indicted for Income Tax Evasion. The Indictment charged that he violated Section 7201 of the Internal Revenue Code (26 U.S.C. 7201) by filing a false return. The Indictment had three counts, one for each of the years, 1959, 1960 and 1961. The amounts of additional Income Tax alleged to be due were: $928.74 for 1959; $5,143.70 for 1960; and $1,207.12 for 1961.

Petitioner McCarthy responded to the Indictment by appearing in Court on April 14, 1966, with Counsel. At that time counsel waived reading of the Indictment and entered a Plea of Not Guilty to each Count.

The Petitioner again appeared before the District Court on July 15, 1966. His counsel stated that McCarthy wished to withdraw his Plea of Not Guilty to Count II of the Indictment and to enter a Plea of Guilty to that count. The Government moved to dismiss Counts I and III.

The Trial Judge asked Petitioner McCarthy whether he wanted to enter a Plea of Guilty to Count II; whether he understood that he was waiving his right to Trial by Jury; and whether he understood he might be imprisoned up to 5 years and fined up to $10,000. Petitioner answered each question affirmatively. The Trial Judge never personally questioned McCarthy as to his understanding of the nature of the crime charged against him. The retained counsel for the Petitioner was never asked if he had informed his client of the nature of the charge, nor did counsel volunteer such a statement.

Without any further questioning, the Trial Judge accepted the Plea of Guilty to Count II and entered a finding of Guilty. The Court then dismissed Counts I and III and ordered a Pre-Sentence Investigation. The matter was set for September 14, 1966 for sentencing.

Petitioner McCarthy next appeared before the District Judge on September 14 for sentencing. The Trial Judge asked McCarthy if he had anything to say before sentence was imposed. McCarthy stated that his actions were not deliberate but depended in part upon his health. There was no questioning by the Trial Judge as to what Petitioner meant by "not deliberate." Indeed there was no further questioning of McCarthy.

The Court entered a sentence of one year imprisonment plus a fine of $2,500.00. The Court and counsel for McCarthy then discussed the manner in which McCarthy's books had been kept. Counsel admitted that the books had been kept in a grossly negligent manner but observed that the negligence had not been in reference to taxation. The negligence, as counsel saw it, arose from Petitioner's

desire for personal spending money. He pointed out that the unreported item of income, a check from Blue Cross, had been deposited in a second bank account when Defendant was in a protracted drinking situation from which he was hospitalized. The Probation Officer suggested that Petitioner had become a member of Alcoholics Anonymous two months prior to the sentencing hearing and that his sponsor was in the courtroom and available to testify. The Court did not take any testimony and refused to vacate the sentence.

Notice of Appeal to the Court of Appeals for the Seventh Circuit was filed on September 23, 1966.

Before the Court of Appeals, Petitioner presented three arguments. The first argument was that Rule 11 of the Federal Rules of Criminal Procedure had been amended, effective July 1, 1966, two weeks prior to the tender of the Plea of Guilty. Petitioner's position was that the changes wrought in Rule 11 were critical in this case. The position of Petitioner is that Rule 11 as amended imposes additional affirmative duties on the Trial Judge. Principal among these is the duty to address the Defendant personally and determine that he understands the charge. The Government's Brief totally ignored the changes in Rule 11 and the arguments presented by Petitioner. Instead the Government argued and cited as authority cases decided prior to the 1966 Amendments to the Rules of Criminal Procedure. These cases held that Rule 11 could be satisfied informally and that there was no requirement for the Court to make a formal determination on Defendant's understanding of the charge.

In its decision the Court of Appeals for the Seventh Circuit cited the same cases, proposed by the Government, as authority, saying their reasoning was in "substantial accord with the result we now reach in this case." (App., p. 5a). The Court said nothing more with regard to an interpretation of the Amendment to Rule 11.

The second issue raised by the Petitioner was that the Trial Judge had abused his discretion by entering judgment on the plea. In support of this argument are these facts: The age of the Petitioner, 66 years; his lack of experience with Federal crimes; the state of his physical, mental and emotional health and stability in light of his alcoholism when the crime was alleged to have been committed and at the time the plea was offered; the complexity of the Government's theory of the case—negligence amounting to intentional tax evasion; an ambiguous statement made by Petitioner which amounted to a denial of the characteristic element of the crime charged. In light of all these facts, Petitioner argued, the Trial Judge should have inquired further. The Trial Judge did not inquire further, neither of Petitioner nor of his Counsel, and proceeded to enter judgment.

The Government answered Petitioner's argument that the failure of the Trial Judge to inquire further was an abuse of discretion by stating that Petitioner was represented by an attorney. The Government, however, does not deny that the Trial Judge failed to inquire of that attorney. The Court of Appeals agreed with the Government and observed that *counsel* for Petitioner was not confused and did not misunderstand the Indictment.

Petitioner's third and most basic argument rested on the Fifth and Sixth Amendments to the United States

Constitution. He argued that a Defendant has a fundamental right to be informed of the nature and cause of an accusation. This right has been implemented by the Federal Rules of Criminal Procedure, Rule 11 in this case. In addition, regardless of the presence or absence of counsel, and regardless of any subsequent presentence or other report, the understanding of the accused as it appears in the transcript of proceedings at the time of tendering the plea is the sole determinant of compliance with this Constitutionally protected right.

The brief of the Government is silent on this argument. The opinion of the Court of Appeals acknowledges that the argument was made by Petitioner but does not answer or decide the argument, nor does the Court indicate why a decision on this point was refused.

REASONS FOR GRANTING THE WRIT.

A. THIS CASE HIGHLIGHTS A SERIOUS DIVISION AMONG THE COURTS OF APPEALS AS TO CRIMINAL PROCEDURE RULE 11. REVIEW BY THIS COURT IS NEEDED, NOT ONLY TO PROTECT DEFENDANT'S RIGHTS, BUT TO ASSURE UNIFORM APPLICATION OF THE RULE.

1. Substantial conflict now exists, by reason of the holding in this case, among the Circuit Courts of Appeals on interpretation of Rule 11 of the Federal Rules of Criminal Procedure. In particular, the Ninth Circuit, sitting *en banc* in the case of *Heiden* v. *United States*, 353 F. 2d 53 (1965), has held that the error of the Trial Judge in failing to ascertain a defendant's understanding at the time of accepting a plea could not be eliminated by a subsequent hearing. The Court there placed the burden of establishing defendant's understanding upon the Government. On the other hand, the opinion of the Seventh Circuit in the present case holds that there is no requirement that a Trial Judge make a determination of defendant's understanding of the charge when accepting the plea.

The holding of the *Heiden* case is an amplification of the rule in *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9, 1964) which was cited by the Advisory Committee in suggesting the 1966 amendment to Rule 11. The rule as amended added an affirmative duty on the Trial Judge to address a defendant personally and determine his understanding at the time the Plea of Guilty is tendered. The wording of the Rule is clear and unambiguous. The rule does not allow any discretion to the Trial Judge with regard to making or not making a determination of defendant's understanding of the charge. The rule is mandatory. It reads, in pertinent part:

> ". . . The Court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . ."

The decision in the *Heiden* case applied to a plea tendered before Rule 11 was amended. The rationale of that case is that fundamental fairness to the defendant requires that the Trial Judge make an independent inquiry of a defendant personally to determine his understanding at the time of tendering the plea.

2. The Seventh Circuit seems to base its decision in the present case on the fact that the defendant's counsel was present at the hearings on defendant's plea.

Petitioner urges that the presence or absence of counsel, in and of itself, is not sufficient to relieve the Trial Judge of his duties under Rule 11. The recent case of *Halliday* v. *United States,* 380 F. 2d 270 (C.A. 1, 1967) considered this point at some length. The Court there said, at p. 272:

> "The Government cites no case holding that the facts that the defendant had heard the indictment and certain testimony, and was represented by counsel, in themselves form a sufficient basis for the requisite findings. Something more is needed. See *Domenica* v. *United States,* 1 Cir., 1961, 292 F. 2d 483; *Gundlach* v. *United States,* 4 Cir., 1958, 262 F. 2d 72, Cert. denied, 360 U.S. 904, 79 S. Ct. 1283, 3 L. Ed. 2d 1255. To the extent that *United States* v. *Hetherington,* 7 Cir., 1960, 279 F. 2d 792, Cert. denied, 364 U.S. 908, 81 S. Ct. 271, 5 L. Ed. 2d 224, may be thought to suggest the contrary, we disagree. We may concede that there was nothing to indicate that the defendant was not acting voluntarily and with full understanding.

This did not satisfy the rule. The rule imposed a burden of inquiry. *Julian* v. *United States*, 6 Cir., 1956, 236 F. 2d 155. Although the circumstances suggested no negative finding, they did not warrant an affirmative one.

It should be noted that the Seventh Circuit in the present case cited the *Hetherington* Case (supra) as controlling; but the *Halliday* case expressly disagrees with the rationale of the *Hetherington* case; and, to that extent, a further division among the Circuit Courts of Appeals is evident. Furthermore, the *Halliday* case specifically holds that Rule 11, even prior to the 1966 Amendment, imposed a *duty of inquiry* upon the Trial Judge. The Sixth Circuit reached the same conclusion as to a duty of inquiry in the case of *Fultz* v. *United States*, 395 F. 2d 404 (C.A. 6, 1966). The position of the Petitioner is that the Amendment of 1966 expanded that duty and made it more explicit. Note should be taken of the instant facts. In this case there was no reading of the Indictment in open court and no testimony was taken or statement made by the Government regarding the charge.

B. THE SIGNIFICANCE OF REVIEW OF RULE 11 EXTENDS FAR BEYOND THE PRESENT CASE.

The interpretation and application of Rule 11 is a recurring question of great importance. Approximately 80% of all criminal cases in the District Courts of the United States are disposed of on Pleas of Guilty (Cf. 8 Moore's Federal Practice 11-4, n. 6).

The importance of a definitive statement on Rule 11 as amended falls in two categories. First, guidelines set by this Court will assure equal justice and consistent procedures to the criminally accused in all of the District

Courts. Second, a clarification of the procedures to be followed by District Judges in accepting Pleas of Guilty will encourage closer attention by the District Judges which should eventually reduce attacks upon the acceptance procedure as applied to individual defendants. Considering the trial time saved by Pleas of Guilty, and considering the length of imprisonment a defendant may face, the small amount of additional time which would be required for a careful observance of the Rule is well warranted. In the *Heiden* case the Court also observed:

> The Rule thus contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset, and that courts are to be freed from the troublesome task of searching at a later date for the truth as to the defendant's then state of mind. 353 F. 2d 53, 55.

The strengthening of Rule 11 by the 1966 Amendment reinforces the logic of the *Heiden* Court's observations.

C. A CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE HAS NOT BEEN ANSWERED.

An unresolved question of Constitutional interpretation is also present. Petitioner has argued that the Sixth Amendment guarantee of a right to be informed of the nature and cause of an accusation requires that the proceedings in open court show that the defendant has been informed and does, in fact, understand the charge. Petitioner further argues that the right to be fully and completely informed is basic and is included within the due process guarantee of the Fifth Amendment. The record in this case is silent on the issue of Petitioner's understanding except for a statement by Petitioner that his actions were "*not deliberate*" and were due in part to his "*health.*"

(App., p. 15a) In view of the nature of the crime, which requires a *specific intent* to defraud, the statement of Petitioner is in effect a denial of guilt, or, at the very least, raises a substantial question as to what he meant by his plea.

At that point the unavoidable duty of the Trial Judge was to inquire further of Petitioner in order to clear the confusion in the record. No further questions were asked, and judgment was immediately entered. (App., p. 16a).

Petitioner's argument is that a conviction which is based upon a record which does not show any attempt by the Trial Judge to establish the understanding of a defendant falls short of fulfilling the "due process" requirement of the Fifth Amendment.

In addition, the Seventh Circuit's decision in this case affirms *Lowe* v. *United States*, 367 F. 2d 44 (C.A. 7, 1966) (App., p. 5a); but *Lowe* (which holds that the Trial Judge is *not* required to make a determination of a defendant's understanding) is diametrically opposed to the language of Rule 11. If Rule 11 is an implementation of the Sixth Amendment, then a failure to closely observe the dictates of Rule 11 is a deprivation of a Constitutionally protected right and a failure to observe the due process of the law.

In the present case there is absolutely no indication in the record that defendant was ever informed of the true nature of the charge. Regardless of the fact of retained counsel, and regardless of the presentence investigation report, the record of the proceedings in open court is fatally defective. No matter how competent and knowledgeable the attorney and the probation officer may have

been, the knowledge and understanding which either of them may possess is immaterial. The critical question, the only relevant question, is whether or not defendant was fully informed and understood the charge at the time the plea was tendered and accepted.

The record contains no direct questioning by the Trial Judge and no statements by counsel as to Petitioner's understanding. The only statement made by defendant which sheds any light on his awareness of the charge is as follows:

> "I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things I have gone through that it never would have happened and it is not deliberate and I am very sorry." (App., p. 15a)

That statement amounts to an act of contrition, but not to an expression of understanding nor of guilt. The entry of judgment on such a record is a violation of Petitioner's rights under the Fifth and Sixth Amendments.

The case of *Hulsey* v. *U. S.*, 369 F. 2d 284 (C.A. 5, 1966), presents a situation similar to the instant appeal. In that case an admitted alcoholic was charged with the interstate transportation of forged securities with fraudulent intent. The defendant pleaded guilty to endorsing the securities; and, upon questioning by the Judge, stated that he recognized the endorsement as his own but could not remember whether the securities in question were forged or not because he had been drinking heavily and could not account for his behavior. The Trial Court accepted the plea, entered judgment, and sentenced the defendant. An appeal was perfected. The Court of Appeals reversed the decision and stated:

"Pleading guilty to the mere endorsement of an instrument, while disclaiming any knowledge of whether it was forged, even aided by the strongest persumption of appellant's comprehension of the offense charged, cannot be viewed as tantamount to an unconditional assertion of guilt to the fraudulent interstate transportation of a forged security with knowledge of the forgery. If anything, such response appears more closely akin to a protestation of innocence than an expression of guilt. It would have been a simple matter for the trial court, when confronted with such equivocal response, to delay accepting the plea until further inquiry clearly established that the accused understood the elements of the crime charged in the information and was willing to enter an unequivocal admission of guilt. See *Kreuter* v. *United States,* 10th Cir. 1952, 201 F. 2d 33. On the other hand, if after being fully apprised of the nature of the charge and the consequences of his plea, the accused persisted in attempting to enter a qualified plea, the trial court should have refused to accept it and set the case for trial. *State* v. *Stacy,* 1953, 43 Wash. 2d 358, 261 P. 2d 400; *People* v. *Morrison,* 1957, 348 Mich. 88, 81 N.W. 2d 667, cf. *Bergen* v. *United States,* 8th Cir., 1944, 145 F. 2d 181. Nothing we have said is intended to suggest that the acceptance of a plea of guilty which merely fails to comply with precise ceremonial or verbal formality will necessitate the setting aside of an otherwise valid conviction and sentence. See *United States* v. *Cariola,* 8th Cir., 1949, 177 F. 2d 505. We are convinced, however, that a fundamental requisite of a plea of guilty is that it manifest an unequivocal and knowledgeable admission of the offense charged and should not be accepted if so limited or conditioned that it constitutes, as in the instant case, little more than an ambiguous expression of qualified guilt coupled with a protestation of innocence. To require that a plea of guilty

which, when accepted by the court, in itself constitutes a conviction no less conclusive than the verdict of a jury, must manifest an unqualified admission of the offense charged, is not to exalt form over substance nor to place a premium upon mere technical verbiage; it is merely to implement a fundamental requirement of due process essential to the fair and just administration of the criminal laws. 369 F. 2d 284, 287."

CONCLUSION.

The facts of this case are not complicated. The Defendant, charged with one of many varieties of Federal Income Tax violation, and represented by Counsel, pleaded Guilty, under circumstances which indicate that his rights were not fully protected. Specifically, the Trial Judge did not question the Defendant as to *his* understanding of the nature of the charge, but the Trial Judge nevertheless entered Judgment on the Plea of Guilty.

Rule 11 of the Federal Rules of Criminal Procedure, as amended, specifically requires the Trial Judge to question the Defendant himself on this very point.

The question in this case is whether Rule 11 means what it says. The Seventh Circuit interprets Rule 11 as though it had been further amended by the words "but not when there is counsel present." For this reason alone, the Decision requires review. In addition, the Decision should be reviewed because of the conflict it creates between Decisions of the various Circuits on this critical aspect of the administration of Criminal Justice in the Federal Courts.

It is therefore respectfully urged that a Writ of Certiorari to the Seventh Circuit be granted herein.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 15929 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM J. McCARTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 10, 1968

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* William J. McCarthy, defendant, has appealed from a judgment of the district court, convicting him, on his plea of guilty, of a violation of § 7201 of the Internal Revenue Code (26 U.S.C. § 7201), as charged in an indictment, upon which he was given a prison sentence of one year and ordered to pay a fine of $2500 and costs.

The first question raised here is whether the plea of guilty was accepted in accordance with rule 11 of the Federal Rules of Criminal Procedure,[1] and the second

[1] 18 U.S.C.A. Rule 11, which provides:
A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining

is whether the court abused its discretion in entering judgment after it allegedly knew or should have known that defendant did not understand the nature of the charge. Lastly an issue is raised as to whether the court denied defendant his rights under the fifth and sixth amendments to the constitution, by entering judgment without any basis for a determination that the defendant understood the nature of the charge.

The grand jury, in count II, charged that defendant wilfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him for the calendar year 1960, by filing and causing to be filed a false and fraudulent income tax return stating his taxable income was $16,804.59 and the tax due was $4,193.56, whereas, as he then and there well knew, they were $29,738.85 and $9,337.26, respectively, in violation of said § 7201.

On April 14, 1966, government attorney Galbraith and attorney Sokol, representing defendant, together with defendant, appeared in court and a plea of not guilty was entered. The cause was then set for trial on June 13, 1966.(2)

When the case was called for trial on July 15, 1966, there were present defendant's counsel Sokol and government attorney Hughes, as well as defendant. The following proceedings then occurred:

> Mr. Sokol: * * * If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

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(1) (Continued)
that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(2) A succession of postponements was thereafter ordered including a setting for trial on July 15, 1966.

The Court: Is that satisfactory to the government?

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant: Yes, your Honor.

The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of $10,000?

Defendant: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

* * * * *

Defendant: That's right, of my own volition, your Honor.

The Court: All right. Enter a pretrial investigation order and continue the matter until the 14th day of September. Same bond may stand.

On September 14, 1966, the case was called for disposition and the court asked defendant personally if he had "anything to say prior to the time that sentence is imposed?" He asked a similar question of defense counsel. The court heard their answers. Sentence was then imposed. The court also stayed execution for sixteen days.

1. Defendant's counsel urge that, because of three changes made in rule 11, Federal Rules of Criminal Procedure, effective *July 1, 1966,* the conviction of defendant on his plea of guilty herein should be reversed. First, they say that a judge is now *required* to address the defendant *personally.* Secondly, they say a judge is now required to "determine from his personal interrogation of defendant that he understands the consequences of the plea", and thirdly the court must determine that there is a factual basis for the plea. However, it is clear the district judge in this case had these recent changes in mind, as the contents of his remarks and questions to defendant indicated.

Counsel for appellant urge that defendant did not understand the nature of the charge against him. They

base this upon defendant's own statement to the district judge when he was asked if he had anything to say prior to the imposing of sentence. The record shows that defendant then said:

> "I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry."

They also rely on the fact that the probation officer informed the court that "defendant had become a member of Alcoholics Anonymous at approximately the time the guilty plea was entered" and that the court was also informed that defendant "is 66 years of age, who had been hospitalized at one time for alcoholism".

However, a complete answer to this contention is that the offense involved here refers to the filing of defendant's income tax return for the year 1960, which occurred on March 19, 1961, or about five years before sentencing which did not occur until 1966. On this appeal the critical date as to defendant's physical and mental being was July 15, 1966 when his plea of guilty was entered—not some five and a half years before sentencing.

Under these facts, we hold that the district court satisfied the requirements of rule 11 in effect on and after July 1, 1966, in accepting defendant's plea of guilty. *Cf. United States* v. *Rizzo,* 7 Cir., 362 F.2d 97, 99 (1966); and *United States* v. *Lowe,* 7 Cir., 367 F.2d 44, 45 (1966). While these cases involved sentencing before July 1, 1966, we find their reasoning in substantial accord with the result we now reach in this case.

2. Next, defendant's counsel contend that the charges made against defendant were complicated and may well have been confused by defendant with lesser included offenses within § 7201, inasmuch as count II of the indictment charged violation of § 7201 of the Internal Revenue Code, by the filing of a "false and fraudulent income tax return". Defendant's counsel insist that such an allegation is undoubtedly quite common, since such an allegation would also form the basis for a violation of § 7207, which

would amount to a misdemeanor. Further, they say, the existence of a tax deficiency "without more would amount to a misdemeanor, if it had been lodged under § 7203. . . ."

They cite *Sansone* v. *United States,* 380 U.S. 343 (1965) as indicating that the distinguishing characteristic of § 7201 is a willful attempt to evade or defeat taxes. Counsel then argue that the only statement appearing in the record concerning defendant's understanding the charge is that the defendant said "it is not deliberate". His counsel now argue that the legal force of such a statement is not clear and yet the court made no attempt to clarify the statement by further questioning of defendant.

The government in reply points out that the plea of guilty was to count II, which charged a violation of § 7201, and that a plea of guilty to a lesser included offense may not be accepted without consent of the government. *United States* v. *McCue,* 160 F. Supp. 595, 602 (D.C. Conn. 1958). The government argues, in essence, and we agree with it, that, under this record, a plea of guilty forecloses applicability of a lesser included offense. Certainly there is no confusion evident upon the record before us. Defendant was represented by able counsel when his plea was entered. He was not then entitled to plead to a lesser included offense. He did not plead to such an offense. The point seems to have arisen, as an appellate proceeding afterthought.

3. Finally, defendant urges that the trial judge erred by ignoring the information presented at the sentencing hearing and thereby failed adequately to establish the full factual basis for the plea of guilty. In addition to rule 11, defendant argues that a second procedural safeguard had been set up to supplement the constitutionally guaranteed rights of defendant in criminal prosecutions. See 18 U.S.C.A. rule 32 (a) (1) amended effective July 1, 1966, which reads:

> (1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. * * * Before imposing sentence the court shall afford counsel an

opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

Counsel in their brief assert that the thrust of the amendment to rule 32 (a) (1) is the same as in the case of the amendment to rule 11. They say that the duties of the judge are indicated more clearly and that the amendment imposes an additional requirement that the judge address the defendant personally. Counsel for defendant admit that while the required hearing was held under the provisions of this rule, the information elicited "was ignored". We do not agree with the latter conclusion of counsel. The district judge observed the letter and spirit of the applicable provisions of the rules and gave proper weight to the substantial testimony presented and the facts otherwise shown to the court, as indicated herein.

The Notes of the Advisory Committee[3] include the following:

"The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or *by examining the presentence report,* or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." (Emphasis supplied.)

It appears by the words of defendant's trial counsel in this case that he was quite aware of the fact that there had been a very thorough presentence investigation made. He stated to the district court:

"I talked to the probation officer and we have been given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—I don't know truly what I could add except to indicate that he is completely contrite."

[3] Fed. Rules Cr. Proc., rule 11, 18 U.S.C.A., 4th paragraph of Notes.

Nevertheless defendant's counsel argue in their brief in this court:

> "The conclusion is inescapable that the trial judge either failed to make a determination that a factual basis existed for a plea of guilty, or that he was in error in reaching an affirmative determination on that issue without additional facts to support his conclusion."

This attack upon the action of the district judge we cannot sustain, in view of the facts that he ordered a presentence investigation, which was admittedly thorough and extensive, and that there are circumstances apparent in this record indicating that the court read the presentence report and satisfied itself by that examination of the existence of a factual basis for the plea. For instance, in a colloquy with defense counsel, in connection with the imposition of sentence, when counsel argued that defendant "never took one single step to delude the investigating officer", the court remarked:

* * * * * *

> "Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent."

* * * * * *

> "I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion the *manner in which the books were kept was not inadvertent.*" (Emphasis supplied.)

The court was of a similar opinion in another instance, a transaction involving a Blue Cross check. The court then expressed his views on the bookkeeping methods of defendant, information about which he could have obtained only from the presentence report, particularly about that check.(4)

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(4) We note also that the government charges that defendant did not ask to examine his preinvestigation report nor did he make it a part of the record on this appeal.

We make the general observation that defendant was represented by retained competent counsel who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty. See *United States* v. *Hetherington*, 7 Cir., 279 F.2d 792 (1960), cert. denied 364 U.S. 908, where, at 795, we said, significantly: "The record shows that the defendant was represented by able counsel"; and at 796, we said:

> "* * * there is no merit to the contention that the defendant was coerced or did not know the consequences of his plea of guilty."

So it is in the case at bar.

For these reasons, the judgment from which this appeal was taken is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Wednesday, January 10, 1968

Before

Hon. J. Earl Major, Senior Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 15929 vs.

WILLIAM J. McCARTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Monday, February 5, 1968

Before

Hon. J. Earl Major, Senior Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 15929 vs.

WILLIAM J. MCCARTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX D

Page of Record

38 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the judges of said court, in his courtroom in the United States Courthouse at Chicago, Illinois on Friday, July 15, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,
By: Mr. Patrick J. Hughes,
Assistant United States District Attorney,
on behalf of the government;
Mr. Bernard Sokol,
on behalf of the defendant.

39 The Clerk: 66 CR 209, U.S.A. vs. William J. McCarthy, trial.

Mr. Sokol: Good morning, your Honor. This matter was set over because of my inability to appear.

The Court: What case is this? I don't even know.

Mr. Sokol: This is United States vs. William J. McCarthy, 66 CR 209, a tax fraud case.

The Court: It was set over for arraignment or what?

Mr. Sokol: No, set over for trial. At arraignment, a plea of not guilty was entered to all three Counts. Mr. Galbraith then appeared for the United States. Mr. Hughes now appears today.

If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty

heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

40 The Court: Is that satisfactory to the government?

Mr. Hughes: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until the plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant McCarthy: Yes, your Honor.

41 The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant McCarthy: Yes, your Honor.

The Court: You understand you may be fined in an amount not in excess of $10,000?

Defendant McCarthy: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant McCarthy: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

42 Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant McCarthy: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

Defendant McCarthy: I beg your pardon?

The Court: Has anybody threatened you to enter a plea of guilty?

Defendant McCarthy: That's right, of my own volition, your Honor.

The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand.

Mr. Sokol: Thank you very much.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

43 Certificate of Official Court Reporter.

24 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois on Wednesday, September 14, 1966 at 10:00 o'clock a.m.

Present:

Honorable Edward V. Hanrahan,
United States District Attorney,
By: Mr. Robert A. Galbraith,
Assistant United States District Attorney;
on behalf of the government;
Sokol, Schwab & Angram,
By: Mr. Bernard A. Sokol,
on behalf of the defendant;
Probation Officer Joseph Sanculius

25 The Clerk: 66 CR 209, United States vs. William J. McCarthy, disposition report on Count 2.

Mr. Galbraith: Good morning, your Honor.

The Court: Mr. McCarthy, do you have anything to say prior to the time that sentence is imposed?

Defendant McCarthy: I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry.

The Court: And you, Mr. Sokol, on his behalf, have you something to say?

Mr. Sokol: Only this, if the Court please; I am quite aware of the fact that there has been a very thorough pre-sentence investigation made in this case. I talked to the probation officer and we have been

given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his history—and he has heard a good deal from me with respect to some of these mistakes—
26 I don't know truly what I could add except to indicate that he is completely contrite.

The Court: And you, Mr. Galbraith?

Mr. Galbraith: Your Honor, only to this extent, as you probably recall, this was originally a three Count indictment in which the government moved to dismiss Counts 1 and 3 at the time that the defendant pled to Count 2. The prime consideration of that was an understanding between the parties that all taxes, penalties and interest would be paid and I just would ask your Honor if you would incorporate some reference to that in the disposition of the matter.

Mr. Sokol: There has never been any disposition to avoid such a consequence.

The Court: I mean, the report indicates that he has ample assets for the government to attach, much in excess of the amount of owed taxes.

Well, I think that with the amount involved here that the deterrent effect of a sentence is desirable. Because of that, the defendant will be sentenced to the custody of the Attorney General for one year and fined $2,500.

Mr. Sokol: Your Honor, may I please ask that
27 the sentence itself be suspended? I would like to, if I may, be heard.

The Court: I will be happy to hear you.

Mr. Sokol: Thank you.

If the Court please, apart from the wrecking of his physical health that has attended a number of the problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs no deterrent. I cannot imagine a man—apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

When I spoke with Mr. Sanculius, I knew that we had given to him some reference to the fact and some
28 attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

Mr. Sokol: I am sorry, your Honor, I did not hear the beginning.

The Court: I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. In my opinion

the manner in which the books were kept was not inadvertent.

Mr. Sokol: Your Honor, it had no reference to taxation. I would like to be heard on that, because we went into this in considerable detail.

When a man is neglectful and adopts a kind of a devious way of secreting himself from the govern-
29 ment, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this—he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

There was no direct relationship to the consequences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that time he had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks. His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, "You have to put yourself under the jurisdiction of your brother," and there was some indication that he was supposed to deposit this and he would not have disposition over his own assets. They did not feel that
30 he could look out for himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps

guess without going into Freudian terms he was oppressed, and in order to free himself—and this had nothing to do with the government—in order to free himself from what he felt was a trap situation where he, at the age of sixty-two or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has—and it is like a little boy—if he has the consequence lying before him he says, "Oh, yes."

In other words, he does not run away if he is faced with it, but that he himself be guided there.

Your Honor, at the age of sixty-five, particularly
31 with this kind of situation, I am positive with all of the help that he has sought and with the—he is actually now—he is no longer his own prisoner, but he is, I think, very, very much confined in terms of the kinds of help he has sought out and I would most entreat your Honor to give him an opportunity to prove to himself as well as to the Court that the remaining years of his life can be acted out in an adult fashion rather than in the little boy behavior that has tended so much of his conduct.

The Court: I mean, if you are still a little boy at the age of sixty-six, why, there is not much time to prove whether you can become an adult.

Mr. Sokol: Your Honor, there is always something to save. If I were ninety years old and they told me I had ten days left, I would want to make those ten days something healthy rather than something sick.

The Court: Anything further?

Mr. Sokol: No, your Honor.

Officer Sanculius: Your Honor, may I say a word.

The Court: Yes, Officer.

Officer Sanculius: Your Honor, I just wondered
32 whether you had received the additional—

The Court: Even if he had not got that pardon anything that happened that long ago has no bearing on what I have done.

Officer Sanculius: The other thing I had in mind, your Honor, is that I have verification that he has been attending the AA group for the past two months and his sponsor is here in Court to verify that if necessary.

The Court: Well, I assume that is unquestionably true. I have known people to get in and out of that club, you know, about every six months. They become a member and cease to be a member and then they become a member.

Mr. Sokol: Your Honor, could your Honor please entertain my motion and try him, please? I am sure that perhaps he can indicate to the Court how much he wants to make good.

The Court: I am sure that he does. Everybody that is confronted with what he is confronted with here has that desire. I feel certain that that is the fact. However, I think that having—

Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of
33 what can best be described as gross neglect, and criminal neglect, if you please.

I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage

But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took place over a series of four years, didn't it, Counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel
34 in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accomplie.

There is no aspect of his existence right now where he has not said, "I am wrong and I need guidance and I will do what somebody else says."

So whether it relates to the matter of drinking, he is with AA, if it relates to the matter of religious discipline, he has put himself very, very closely on a day to day and week to week responsibility arrangement.

Mrs. McCarthy is here and can testify to the fact that the idea of accountability is very, very much more in his picture.

The big thing, I think, is that so far as accountability to his government is concerned, that before this indictment took place, he had already put himself into Mr. Angram's hands. It was through Mr. Angram that a number of these things were crystallized, and they were submitted.

The Court: All right, the sentence heretofore entered is not vacated; a year in the custody of the Attorney General and $2,500 fine.

Mr. Sokol: May we have a stay of execution for ten days, if the Court please.

The Court: Execution for ten days.

The Marshal: He is to surrender to the Marshal at noon on the tenth day?

The Court: Surrender to the Marshal on the 26th day of September at noon.

Defendant McCarthy: Your Honor, could I make a little statement, please.

The Court: What? I cannot hear you.

Defendant McCarthy: I'm handling the printing of the ballots for the County at the moment. It is going into the hands of Mr. Barrett and will take at least fifteen days. I handle it myself personally and it will take fifteen days to complete it.

The Court: I will extend the stay of execution until noon on the 30th of September, which is sixteen days. Noon on the 30th of September you are to surrender to the Marshal.

(Which were all of the proceedings taken and had in the above-entitled cause on the above-mentioned date.)

APPENDIX E

AMENDMENT V

United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 26, UNITED STATES CODE § 7201

Attempt to Evade or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

TITLE 18, UNITED STATES CODE

Federal Rules of Criminal Procedure, Rule 11

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.* If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a judgment upon a plea of not guilty. *The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.* As amended Feb. 28, 1966, eff. July 1, 1966.

[The portions of the Rule in italics are the additions to the Rule which constitute the Amendment of February 28, 1966 which became effective July 1, 1966.]